IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 19

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT COMMISSION

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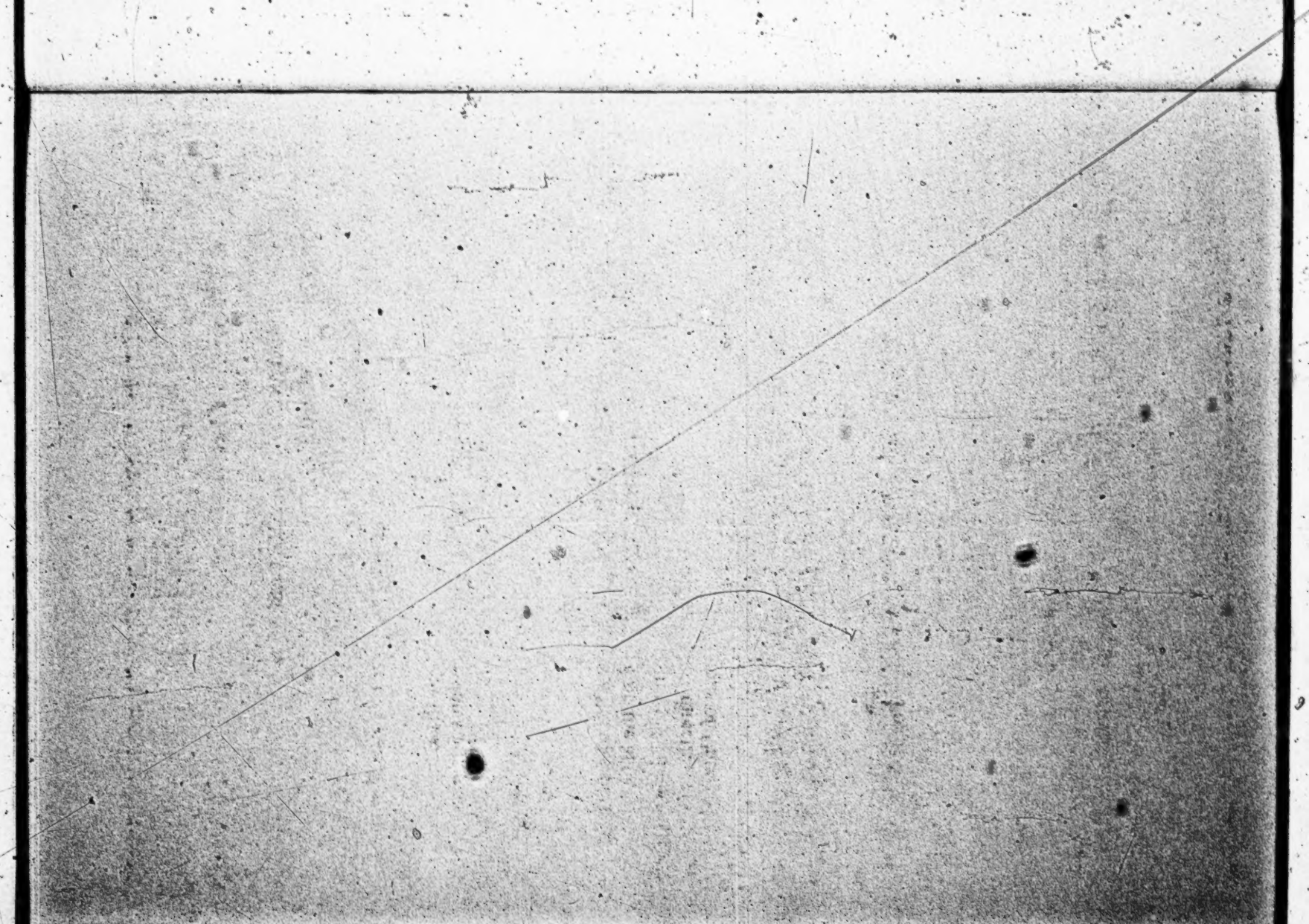

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BRIEF FOR RESPONDENT COMMISSION

This Brief consolidates the argument of the Commission to the brief of the petitioner and the amicus curiae memorandum of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Do the Petitioners Urge an Improper and Incorrect Interpretation of the Statutes Involved?

2. Is the Transportation Service To Be Provided by Universal "Transportation" Under the Compact?

3. Is the Transportation Service "by the Federal Government", and Therefore, Exempt from the Provisions of the Compact?

COUNTERSTATEMENT OF THE CASE

The proceedings in the courts below stem from an action instituted in the District Court by the Commission for an injunction and for declaratory relief to enjoin Universal from engaging in the transportation of passengers for hire in the Mall area of the District of Columbia, unless and until such transportation is authorized by a certificate of public convenience and necessity issued by the Commission.

The Commission is an instrumentality of the District of Columbia, the State of Maryland, and the Commonwealth of Virginia, created by an interstate compact, the Washington Metropolitan Area Transit Regulation Company ("Compact"), between the aforementioned political jurisdictions. The Congress of the United States gave its approval to the District of Columbia to enter into such compact and consented thereto by Public Law 86-794, September 15, 1960, 74 Stat. 1031 (D.C. Code § 1410, 1961 Ed.), as amended. The purpose of the Compact was to create in one agency the regulation of the transportation of persons for hire in theWashington Metropolitan area, which was recognized by Congress as a single unified urban community. The Compact became effective March 22, 1961.

In the Fall of 1966, the Secretary of the Interior ("Secretary") instituted, on an experimental basis, a so-called "interpretive shuttle service" to transport passengers over public streets (App. 57) through the Mall area of the District of Columbia. Subsequently, the Secretary issued a prospectus soliciting proposals from various private interests to provide a similar service.

Universal, a California corporation, was selected to be the recipient of a contract to provide the service; the contract was thereupon negotiated between Universal and the Secretary, acting through his Director of National Parks.

Under the terms of the contract, Universal, called a concessionaire, is required to operate a transportation service along routes requested by the Park Service throughout the Mall area. It is further required to provide guides to give a narration to the passengers as the vehicles are in route. Additionally, Universal must station guides at designated points of interest throughout the Mall area. While there is no charge for the latter service, visitors utilizing the transportation service must pay Universal a fee for his guided transportation ride.

Washington Sightseeing Tours, Inc., Blue Lines, Inc., White House Sightseeing Corporation, and D. C. Transit System, Inc., intervened as parties-plaintiffs.

The United States was granted leave to file a representation of interest, to present evidence, file briefs, and otherwise take part in the proceeding.

The Commission's motion for preliminary injunction was consolidated with a hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The consolidated hearing was conducted on April 25 and 26, 1967.

The claims of the various parties in the District Court and the court of appeals may be succinctly summarized:

(a) *Commission.* The Commission asserted that the case was governed by the terms of the Compact; that the transportation service to be provided by Universal was transportation as that term is used in the Compact and that, therefore, Universal was subject to the provisions of the Compact, unless it could be shown that the transportation fell within one of the exemptions provided therein or unless some other statutory provisions removed the transportation service from the terms and applicability of the Compact. It further asserted that the National Park areas of the District of Columbia are within the geographical area[1] under which the Commission has jurisdiction. Further, that the transporta-

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[1] Article I, Compact.

tion operations of Universal are not exempt by the terms of the Compact nor by any other statutory enactments of Congress; and that Universal may not engage in transportation for hire within the Metropolitan District unless and until that transportation service is authorized by a certificate of public concenience and necessity.

(b) *Certificated Carriers.* The intervenors adopted the Commission argument. D. C. Transit additionally asserted that the proposed service by Universal constitutes transportation of persons for hire on a scheduled service over a fixed route which will traverse portions of D. C. Transit's regular routes; that such services are derogatory of the protection afforded it not only by the Compact, but by the franchise granted to Transit by Congress, 70 Stat. 598 (September 8, 1956). All of the intervenors further adopted the principle that they would suffer a possible loss of revenue as a result of the proposed service. The Commission disavowed acceptance or reliance upon, for purposes of this suit, the economic injury or impairment of the Congressional franchise arguments, stating that these were matters which properly should be laid before it in a certificate-application proceeding.

(c) *Universal.* The primary argument raised by Universal was that it would not be engaged in "transportation" as that term is used in the Compact. It took the further position that in the event its transportation service would come within the purview of the Act, the transportation service was exempt because it was "by the Federal government". (Section 1(a)(2), Article XII)

(d) *The United States.* The Department of Justice represented that since the transportation service of Universal would be provided as a concessionaire to the National Park Service, the transportation was by the Federal government and therefore exempt from the jurisdiction of the Commission.

The District Court below found that the transportation services of Universal were not transportation under the Com-

pact and accordingly Universal was not subject to the Commission's jurisdiction. Moreover, *obiter dictum*, it stated that even if the transportation were subject to the provisions of the Compact, such transportation was "by the Federal government", and therefore exempt from Commission jurisdiction.

The petition for an injunction and for declaratory relief was denied.

Thereafter the Commission and the intervenors appealed to the District of Columbia Court of Appeals.

The Court of Appeals reversed, holding that:

> "the various relevant statutory provisions, construed in relation one to the other, especially in view of the physical location of the Mall in the Metropolitan area of the District of Columbia do not afford authority to . . . Universal . . . validly to engage in such transportation for hire in the Mall area as is contemplated by the contract . . . without a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission authorizing such transportation. . . ."

SUMMARY OF ARGUMENT

I. This case is basically one of statutory interpretation. It involves two areas of legislative enactments by Congress—one conferring certain proprietary and supervisory powers upon the Secretary of the Interior with regard to National Park areas in the District of Columbia, and the other conferring plenary regulatory powers over transportation for hire in the District and its environs upon the Transit Commission. The two laws are not individually or mutually exclusive, but must be read together to reveal the true intent of the Congress, which was to confer dual jurisdiction over certain areas on the two agencies.

II. The various constructions of the Compact urged by petitioner, on the assumption it were applicable, are not only lacking in merit, they are harmful and mischievous in that

they would emasculate the Commission's ability to deal effectively with transportation problems in the Washington area. Thus, the Commission's interest and powers are not limited to "interstate" transportation or "commuter" transportation or "mass" transportation but to all transportation for hire in the Washington area. Further, not only is the proposed role of Universal not "transportation by the Federal Government", to hold otherwise would open the door to such widespread avoidance of the Commission's jurisdiction as to destroy its power to achieve the unified and coordinated regulation which is the objective of the Compact. Finally, the transportation involved is obviously transportation "between points" as stated in the Compact.

ARGUMENT

A reading of the briefs of petitioner and the United States creates the impression that the central question involved in this case is the preservation of the power of the Secretary of the Interior to deal effectively with problems arising in park areas of the District of Columbia. The Commission submits that this is not the central issue and that, indeed, affirming the court of appeals will have little impact on the Secretary's ability to discharge his responsibilities effectively.

Rather, the central issue in this case is preserving the intent of Congress, and of the two state legislatures of Maryland and Virginia, to have a unified and coordinated system of transit regulation in the Washington Metropolitan area. Prior to enactment of the Compact, there existed a hodge-podge of transit systems without unified direction and control. Congress sought to correct that undesirable situation by enacting clear statutory language to create a new agency, the Transit Commission, with the requisite powers to regulate all transportation for hire in the area. Petitioner and the Secretary now contend that they can, without any regard to the provisions of the Compact, establish a major transportation system, designed, by their own admission, to serve tens of millions of riders annual in the

very heart of the city itself. Despite their glib claims to the contrary, the existence of such a major transportation unit in the heart of Washington would unquestionably have a substantial impact upon the carriers and the problems with which the Transit Commission has to deal. Petitioner's argument creates the possibility of one major transit system subject to the jurisdiction and control of the Commission sharing the streets with another major system which can simply ignore the Commission's attempts to achieve coordinated transportation. This is a prospect which the Court should not accept unless the statutes involved clearly so require.

In their zeal to escape the Commission's jurisdiction, the petitioner and the Secretary do not simply attempt to downgrade the stature and intent of the Compact, they urge interpretations of its language which are so twisted and mischievous that, if accepted, they could seriously damage, or even destroy, the Commission's ability to deal with the problems which come before it.

Petitioner's position is doubly unfortunate because, as a practical matter, it is truly unnecessary. The Commission has made it clear from the outset that its assertion of jurisdiction is not meant to oust the Secretary from his legitimate powers over park areas. The Secretary would remain free to determine that bus service is needed on the Mall and it is difficult to conceive that that determination would, or could, be ignored by the Commission. Certainly, any action by the Commission in this regard is subject to review by the courts. The Secretary would be free to choose a concessionaire and impose any contractual obligations upon him he sees fit. True, the concessionaire would also have to comply with the obligations imposed upon him by the Compact but these obligations are entirely compatible with the objectives of the Secretary and create no real possibility of conflict with the Secretary's powers or objectives. The Government's claim (Memorandum for U.S., p. 17) that the Commission would invade areas outside the area of its legitimate concern and seek to frustrate the Secretary's aims is

not only a fevered and unworthy contention to make concerning another governmental body, it is indicative of the somewhat unreal basis underlying the Secretary's opposition to the Commission's jurisdiction.

The central issue in this case, then, is the potential harm to unified cohesive regulation of transportation in Washington and environs which could result from acceptance of the petitioner's arguments. We should now examine the language of the pertinent statutes, and their legislative history, to see if this result is required.

I

PETITIONERS URGE AN IMPROPER AND INCORRECT INTERPRETATION OF THE STATUTES INVOLVED

There were three salient questions resolved by the court of appeals. First, that the transportation service of Universal came within the meaning of the Compact. Secondly, no provision in the Compact exempts that transportation service from the Commission's jurisdiction. Thirdly, the transportation service is not removed from the Commission's jurisdiction by any other Congressional law.

This case involves a straightforward matter of statutory interpretation. There is, on the one hand, the Compact which contains broad language conferring plenary powers on the Commission over transportation for hire in the Metropolitan District. There are, on the other hand, a range of statutes which confer certain plenary jurisdiction upon the Secretary over the administration of the National Park System. It is the Commission's position that this case involves acts of Congress of equal dignity and importance. The opinion of the court of appeals holds that each must be read to form a harmonious whole. Universal prefers to turn the Compact into an attempt at usurpation of federal power by the states and thereby deprive it of its status as an act of Congress.

Ignoring the fact that one of the signatories was the District of Columbia, beyond question a creature of the Federal Government, and further ignoring that Congress carefully reviewed the entire terms of the Compact and passed a specific act authorizing its creature, the District Government, to enter into it, Universal and the Government argue that other Federal statutes, concerning the Secretary's powers, must alone be considered as determining the question at issue. The provisions of the Compact supposedly cannot impinge upon these statutory provisions. This is a wholly unacceptable point of view. The Compact must be regarded as reflecting the will of Congress, just as any other Congressional enactment does.

We turn now to a general consideration of the language of these Acts. There is nothing in the statutes spelling out the Secretary's powers which specifically deals with the provisions of the Company. The real question is: what is the relationship between those powers of the Secretary and the powers conferred upon the Commission? The language of the Compact, and its legislative history, provide an answer to that question. The Compact specifically preserves the "normal and ordinary police powers . . . of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities." Compact, Article XII, Section 3.

Does this confer upon the Secretary the exclusive jurisdiction he claims in this proceeding? It would seem not. The Secretary specifically requested that this language be changed to reflect the broader powers he claims and Congress did not act upon his request. Thus, the Secretary of the Interior objected to the language in the proposed consent legislation restricting his jurisdiction over transportation in the Metropolitan area to "normal and ordinary police powers." In his letter the Secretary stated as follows:

> The proviso beginning on line 5, page 51, purports to save the ordinary police powers of the signatories and the Director of the National Park Service with

respect to the regulation of vehicles, control of traffic, and care of street, highway, and other vehicular facilities. Since "police powers" is not a term descriptive of the authority and responsibilities of the Director of the National Park Service, we recommend the following clarifying amendments:

On page 51, lines 8 and 9, delete "and of the Director of the National Park Service."

On page 51, line 11, after the colon insert "Provided further, That nothing in this Act or in the compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916 (39 Stat. 535), as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System."

H. Rep. No. 1621, p. 49.

The recommended clarifying amendments were rejected by the Congress.

Universal tries to brush this fact aside as being at least as consistent with its position as with the Commission's.[2] This attempt to avoid the damaging legislative history is woefully weak.

First, it ignores the fact that Congress had enacted the exemption now claimed by the Secretary in the Interstate Commerce Act, an act which controlled the Commission's predecessor regulator of interstate transportation in the Metropolitan District. Yet, it did not carry that exemption

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[2]Petitioner asserts that the Commission seeks to use Congressional silence as assent. This ignores the posture in which this question arises. It is petitioner which urges that the language of the Compact concerning the police powers of the Secretary preserved the Secretary's exclusive jurisdiction untrammelled. The Commission simply replies that the Secretary sought to spell this out in the Compact and was unsuccessful. In this setting, the failure of Congress to adopt the Secretary's language is more convincing evidence that the Commission was intended to have certain jurisdiction in the Mall area than the contrary.

forward into the Compact.[3] Secondly, it ignores the established and unquestioned powers of another of the Commission's predecessor regulators. It is asserted by Universal that the D. C. Public Service Commission never claimed jurisdiction over public transportation in the National Park areas of the District. This was not so prior to the Compact and is not so today. The D. C. Public Service Commission has always set fares and regulated practices for taxicabs (and for buses, when it regulated them) which operate in National Park areas. The Mall area is included on the D. C. taxicab zone map and it has never been questioned that the D. C. Public Service Commission can set fares in that area. Moreover, the D. C. Public Service Commission, like this Commission since it assumed jurisdiction, consistently authorized bus routes which operate over and through National Park Service areas. The Public Service Commission, like this Commission, has recognized the Secretary's power to exclude vehicles of public transportation from park areas, or to regulate the conditions of use. But the Public Service Commission has also exercised its own jurisdiction to regulate transportation in those areas. The Secretary's claim of "exclusive" jurisdiction must be treated in the light of this history and practice.

Petitioner asserts that the prior regulation by the Public Service Commission and the Commission involved transportation primarily off of park lands, and such regulation of transportation on park roads was merely at the sufferance of the Secretary. So, it is claimed, he is free to oust that service on park roads at his whim or caprice. Assuming the latter is true; this does not equate to excusing the service on the park streets, *if operated*, from the jurisdiction of the

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[3] Other exemptions also were not carried forward into the Compact. Some examples: vehicles owned by hotels used to transport hotel patrons between hotels and local rail or carrier stations, § 203(b)(3); incidental to air, § 203(b)(7a); commercial zone, § 203(b)(8); and casual transportation, § 203(b)(9); 49 U.S.C.

Commission, i.e., the necessity for a certificate of public convenience and necessity from the Commission.

We have never asserted that the Secretary could not close a street to bus service—that is the prerogative of any of the political jurisdictions in the Metropolitan District, under their "normal and ordinary" police powers. We do say that if bus or tram service is to be operated, it must be authorized by the Commission.

The Public Service Commission and the Commission did not have the jurisdiction they have exercised over transportation on the Mall *conferred* upon them by the whim or acquiescence of the Secretary. Not even he would claim such power. No, that jurisdiction was conferred by Acts of Congress. It is true that the Secretary has certain powers conferred upon him and in some instances his power may override the power conferred upon the regulatory commissions. This cannot, however, obscure the fact that the Public Service Commission had power, and still has power, over certain aspects of transportation on the Mall and that certain aspects of that power have passed to the Commission.

Petitioner continues its argument by claiming that the Compact does not contain any express provision granting regulatory power over park lands. Moreover, it claims, Congress did not confer any powers upon the Commission not possessed by its predecessors. The short answer to this allegation is that no particular plot of ground was singled out, because the entire Metropolitan area was encompassed within the Commission's geographical jurisdiction. Why should park lands have been singled out for special or preferred treatment? The Pentagon was not, nor the White House and the Capitol; no city, county, or state property. Moreover, petitioner confuses the word "power" with "jurisdiction". To be sure, our predecessors were limited—as are we—to "regulatory" powers. We have previously pointed out where certain transportation excluded from the *jurisdiction* of the Interstate Commerce Commission was not

excluded from our jurisdiction. See footnote 3, p. 11, *supra*. And this was drawn to the attention of Congress. For example, much of the local interstate transportation was exempt from regulation prior to the enactment of the Compact.

> "So far as the metropolitan area is concerned, however, an important part of the area transit is not subject to regulatory control by virtue of the commercial zone exemption. Such a situation clearly mitigates against the development of unified and coordinated transit service within the metropolitan area. *This is one of the major deficiencies in the existing regulation of transit in the metropolitan area and one which the compact is designed to eliminate.*" Hearings on H.J. Res. 402 Before Subcommittee No. 3, House Committee on Jud., 86th Cong., 1st Sess., Pt. 1, p. 198 (1959). And see, H.R. Rep. No. 1621, 86th Cong., 2d Sess. 6 (1960) (hereinafter cited as H. Rep. No. 1621). (Emphasis added.)

It should be pointed out that the portions of the debate from the legislative hearings cited by petitioner in its Brief, pp. 28-29, relating to "powers" are, we believe, taken out of context and their purport mischaracterized. The Tuck-Fenwick dialogue arose over the question as to whether the Commission was being given "powers" beyond the "regulatory" concept; that is, would the agency have the power to tax or to control labor.

This brings us to another of the incorrect characterizations set forth by the petitioner. The Commission is not seeking, in this proceeding, to usurp any of the functions or powers of the Secretary.

Petitioner poses one salient question: If the Commission were to be omnipotent in the regulatory field, why weren't the laws of the Secretary specifically suspended along with the States' and ICC laws? The simple answer to this contention is that the Secretary was obviously not considered to be a transportation regulator. It would certainly be irrational for the Congress, in suspending applicable Federal laws, to

list every Department or agency head and decree that his "regulatory" powers over transportation was being suspended. In short, no one in—or out—of Congress, including the Secretary of Interior, envisaged that office as being endowed with economic regulatory powers over transportation.

The Commission does not assert exclusive jurisdiction over the transportation involved here. Moreover, it should be clearly understood that the Commission is not seeking by this suit to block the proposed service. Rather, it is the Commission's position that this is one of many situations in government where dual jurisdiction exists. The Secretary may exercise the powers spelled out in the petition to enter into a contract with a concessionaire. He may impose whatever conditions he sees fit. The Commission asserts, however, that before the concessionaire can operate pursuant to that contract, the concessionaire must comply with the Compact. This means, first, that he must obtain a certificate of convenience and necessity. It can only be assumed that in passing on that question, the Commission will be guided by that spirit of comity which should prevail when dual jurisdiction exists. It seems inconceivable that the Commission would not weigh heavily and carefully the Secretary's assessment of the need for the service. Moreover, any abuse of discretion by the Commission in this regard can be reviewed by the courts. Similarly, that same spirit of comity should operate to avoid, or ameliorate, any problems that might arise in operating pursuant to the contract between the Secretary and his concessionaire. The opinion of the court of appeals clearly recognizes this comity concept.

The reliance upon 16 U.S.C. §§ 20 et seq., to supplant the regulatory jurisdiction of the Commission is misplaced. Those statutory provisions were enacted in 1965, five years after the Congressional approval of the Compact. They are obviously intended to have nationwide applicability, except where Congress has previously committed itself to the con-

trary in the Washington Metropolitan area. The concept of Congress acting to strike down state boundaries, yet retaining a jurisdictional barrier around the Mall, for transportation regulatory purposes, is patently ridiculous.

The petitioner further asserts that the position of the Commission would permit regulatory control of United States land by representatives from two states. A similar argument was raised in the Congressional hearings on the Compact, where it was asserted that the three-state agreement would permit the sharing of jurisdiction over transportation solely within the District of Columbia, and thus violate the "exclusive" aspect of the District of Columbia clause of the Constitution.

Congress declined to accept the argument, by noting the safeguards in the Compact, and proclaimed that "These safeguards assure and preserve Federal control over transit in the District of Columbia and effectively prevent the States of Maryland and Virginia from interfering with or embarrassing the Federal Government in its operations at the seat of government." Senate Report No. 1906, accompanying H.J. Res. 401, p. 31 (August 23, 1960). Moreover, in the Preamble to H.J. Res. 401, wherein consent to the Compact was given, Congress said that the Compact "adequately protects the national interest . . . and properly accommodates the National and State interests. . . ."

To sum up, the court of appeals had before it a series of statutes which spell out the Secretary's powers over the National Park areas of the District of Columbia. It also had before it the Compact, which spells out the Commission's powers over public transportation in the Metropolitan District. The statutes on the Secretary's powers do not contain any specific language concerning the Commission's powers. The Compact, on the other hand, does deal with the Secretary's powers. The language used, and its legislative history, does not support the Secretary's claim of exclusive jurisdiction. Nor is this claim supported by the practices of the Commission's predecessor as regulator of public transporta-

tion in the District of Columbia. In these circumstances, the preferable way in whch to resolve the question of statutory interpretation is the way suggested by the Commission and adopted by the court of appeals. Dual jurisdiction exists. The Secretary may exercise the powers conferred upon him, but his concessionaire must also comply with the provisions of the Compact. Any possible conflicts arising from this dual jurisdiction will be avoided by the exercise of understanding by each government agency involved and comity, with the courts available to arbitrate any irreconcilable disputes. In this way, the Commission will not be completely excluded while a major unit is added to the system of public transportation in the area in which it is directed to achieve a rational, coordinated public transportation system serving the needs of all.

The United States contends that it was error for the Court of Appeals to declare that the Mall area is within the geographical jurisdiction of the Commission (Memorandum, p. 9), although it admits that "[t]echnically, of course, the national park areas in question are within the Metropolitan District. . . ." This assertion criticizes the Court for giving a "literal" application to the language of the Compact. This is impertinent sophistry, for the Court of Appeals stated that it considered the various relevant statutory words as "construed in relation one to the other." It was, obviously, seeking an interpretation of various acts of Congress which would provide a harmonious result.

II

UNIVERSAL'S SERVICE IS WITHIN THE MEANING OF THE COMPACT AND THEREFORE THE AMBIT OF THE COMMISSION'S JURISDICTION

A. Universal's Service Is Transportation

Section 1(a) of Article XII of the Compact states:

> This Act shall apply to the *transportation* for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except . . . (Emphasis supplied)

1. The language of Section 1(a) is clear and unambiguous. Nevertheless, Universal argues that the term transportation as used in Section 1(a) means "mass transit", and does not apply to all other forms of transportation, including contract, charter, sightseeing and other forms of special operations. To make such a determination is to ignore that:

(a) Previous regulation by the Commission's predecessor agencies included charter, sightseeing, contract and other special forms of transportation. Indeed, as conceded by Universal and the United States before the courts below, the District of Columbia Public Service Commission still has jurisdiction to regulate bus fares in the Mall area. Since the jurisdiction of the District of Columbia Public Service Commission to regulate bus fares was transferred by the Compact to the Commission, the latter thus has jurisdiction to regulate the transportation of Universal.

(b) The administrative practice of the Commission has included regulation of such forms of transportation.[4]

(c) The courts of appeals for both the District of Columbia and the Fourth Circuit have recognized the Commission's

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[4] See certificates of public convenience and necessity attached to WMATC Exhibit No. 3.

jurisdiction over such non-mass transit forms of transportation. The District of Columbia court of appeals said in *Bartsch v. WMATC*, 120 U.S. App. D.C. 107, 344 F.2d 201 (1965), that:

> "[t]he Transit Commission, by virtue of a Compact entered into among Virginia, Maryland, and the District of Columbia, has broad jurisdiction over commercial transportation carried on in the Washington area. . ."

Further, in *D. C. Transit v. WMATC*, __ U.S. App. D.C. __, 376 F.2d 765 (March 7, 1967), Judge McGowan wrote:

> When Congress consented to the Compact in 1960, it elected to treat the Metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity.

Obviously, the term "transportation" cannot be so narrowly construed as to mean only "mass transit or commuter service," but must be given its normal and ordinary meaning, which would embrace all forms of transportation, whether regular or irregular route, mass transit or special, charter, and pleasure tours. Moreover, such a construction is consistent with Congress' mandate that "[i]n accordance with the ordinary rules for construction of interstate compacts, this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Article XI, Compact. "The Act [Interstate Commerce] is remedial and to be construed liberally." *Piedmont & Northern Ry. v. Commission*, 286 U.S. 299, 211. See further, *Tcherepnin v. Knight*, 88 S. Ct. 548, 553.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Associations*, 310 U.S. 534, at 543.

We do not need to search aimlessly through the Compact or the consent legislation to find the legislative intent. The Senate Report on the legislation states: "Title II of the compact provides the regulatory law which is to be administered by the Commission . . . *Section 1 defines the scope of the compact and the transportation covered.*" (Emphasis supplied)

The key word in Section 1(a) is "transportation". The term "transportation" should be given its ordinary meaning unless otherwise defined or its literal meaning would lead to absurd results or *plainly* at a variance with the policy of the legislation as a whole.

The term "transportation" is not defined. However, it appears repeatedly throughout Title II and, from the various areas that it is used, can only be construed as having the widest of meanings, embracing all forms of movement of passengers except those enumerated as exemptions in Section 1(a)(1)-(5), (b), and the partial exemption in (c).

Furthermore, the basic function that Universal is to perform is the movement of people in vehicles between points in and around the Mall area. That the transportation is to be supplemented by a lecture of "interpretation" of the Mall area does not change the transportation service or mean that transportation is not to be rendered.[5] Every sightseeing carrier regulated by the Commission renders a lecture service in conjunction with their tours (App. 55). Moreover, every single applicant for the contract was either a transportation company or experienced in performing a transportation service (App. 39). In fact, most of them hold certificates from the Commission.

Universal's theory, if adopted, will undermine the regulatory scheme adopted by the legislatures, and turn the

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[5]The concept that the movement of people is "incidental" to a lecture would, if adopted, be applicable to the Interstate Commerce Act and perhaps even the Civil Aeronautics Act. Presumably a widespread invasion of the charter and sightseeing industry could and would occur.

transportation field into absolute chaos. There are many types of transportation requiring regulation which do not fall into the category of "commuter" or "mass" transportation. Many of these not only require regulation considered alone, they can have an impact on so-called mass transportation. To adopt petitioner's argument would open the door to operators of any type of transportation other than "mass" or "commuter" transportation to ignore the Commission's authority.

2. Next, Universal contends that because the transportation in question is to be performed on the Mall, it is not covered by the Compact.

The political boundaries between the states which were discarded by the enactment of the Compact would thus be planted around property owned by the Federal government. While the Commission is charged with the alleviation of traffic congestion (Article II), the very heart of the area would be taken out of its hands, and henceforth any service operated in or through the Mall area deemed to be required by the public convenience and necessity would be subject only to the "sufferance" of the Secretary of Interior. This is contrary to the legislative declaration of Congress that the metropolitan area of Washington should be treated as a geographical unit, with the Commission as the central licensing and rate-making authority.

The Federal enclave in the District of Columbia *is not an isolated area* such as Yellowstone National Park. The court of appeals stressed this fact. Congress recognized this, by refusing to alter its consent legislation as requested by the Secretary (see *supra*, p.), by not excluding such areas from the defined geographical area of jurisdiction of the Commission, by eliminating the exemption that exists in the Interstate Commerce Act, and by declaring that the Metropolitan Washington area is a single, unified urban community.

3. The legislative history of the Act is directly contrary to the assertions and conclusions of Universal and the United States.

The House Committee on the Judiciary, Subcommittee No. 3, held extensive hearings concerning the proposed Compact. One of the prime architects, Jerome Alper, Esquire, prepared for the National Planning Committee a comprehensive report on "Transit Regulations for the Metropolitan Area of Washington, D. C." In that report he pointed out what the jurisdiction of the Transit Commission would be under the act. In part he stated:

> "This commission would have *exclusive jurisdiction* over the movement of passengers for a charge between *any* points in the district by motor carrier or street railway. Both contract and common carriers performing such transportation would also be subject to the jurisdiction of the compact commission. * * * *Sightseeing or charter service within the metropolitan district performed by a carrier engaged in transportation subject to the compact law would also be subject to the jurisdiction of the compact commission.* School buses and motor carriers operated by the federal government, the signatory States, or any political subdivision thereof, and any transportation by water would be exempt from the jurisdiction of the compact commission. Taxicabs would be subject to the jurisdiction of the compact commission only for interstate rate-making purposes. (Emphasis supplied)

Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Eighty-Sixth Congress, First Session, p. 81.

Thus sightseeing and charter service performed anywhere in the Metropolitan District is "transportation" under the Compact.

Petitioner claims that the primary purpose of its service is not "transportation" but the interpretation of the national shrines on the Mall. Transporting twelve million—*twelve*

million—people is only an incidental thing. Nevertheless, a fleet of buses to handle this mass of riders must be put on the streets within the very heart of the city. Yet, it is contended that the Commission is concerned by law only with "municipal" problems. Municipal problems, it is said, do not include the movement of twelve million people within the very heart of this "unified, urban city." It is inconceivable that this was the intent of Congress.

B. The Transportation To Be Provided by Universal Is Not "Transportation by the Federal Government". To Hold Otherwise Would Dangerously Weaken the Compact

Article XII, Section 1(a) states that the Compact shall apply to the "transportation for hire *by* any carrier of persons between any points in the metropolitan district and to the *persons engaged in* rendering or performing such transportation service" except, *inter alia*, "transportation by the Federal government, the signatories hereto, or any political subdivision thereof." (Emphasis supplied)

It is submitted that there is no precedent extant for the proposition that a carrier of persons pursuant to a contract with the Government is thus considered to be performing transportation by the Government. Indeed, the contrary position has been taken both by the Interstate Commerce Commission and the Federal Courts.

The Interstate Commerce Commission has consistently held that a carrier performing transportation service under contract with the Federal Government must, nevertheless, be the holder of a valid certificate of public convenience and necessity issued by the Commission. In the case of *A. B. & W. Transit Company Extension of Operations - Washington National Airport*, 30 M.C.C. 618, a carrier providing service to Washington National Airport under contract with the Administrator of Civil Aeronautics nevertheless applied for a certificate of public convenience and necessity from the

Interstate Commerce Commission. *A. B. & W. Transit Company Ext. - Dulles International Airport*, 88 M.C.C. 175, involved the rendition of common carrier service to Dulles Airport. The administrator of the Federal Aviation Agency intervened to request that any certificates granted be conditioned on observance of its rules, regulations and requirements. He conceded, however, that section 206(a)(1) of the Act made it mandatory that the carrier with which it might contract for the proposed service must hold certificates of public convenience and necessity issued by the Commission.

The present F.A.A. ground transportation concessionaire at Washington National and Dulles Airports performs that transportation pursuant to a certificate from the Commission.

Likewise, this same issue was raised by a defendant common carrier in *U.S.A.C. Transport, Inc. v. United States*, 203 F.2d 878 (10th Cir. 1953), cert. denied, 345 U.S. 997 (1953). That carrier attempted to avoid criminal prosecution by alleging as one of its defenses that it was providing transportation for the U.S. Government and, therefore, a certificate of public convenience and necessity was not required. The Tenth Circuit Court of Appeals rejected that defense stating at pages 878-79:

> "The defense that the required certificate is not necessary where a common carrier transports property for the United States Government is not well taken. Section 306 of the Act provides that it is a violation for a common carrier to engage in interstate commerce on the public highways without possessing a certificate of public convenience and necessity from the Commission. A common carrier transporting goods for the United States Government for hire from one state to another is still a common carrier, engaged in interstate transportation, to the same extent as when thus transporting goods for a private individual. *Of course, if the Government itself transports* its own goods, it need not have the required

> certificate because it is not subject to the provisions of its own laws. That is the principle laid down in *Dollar Savings Bank v. United States*, 19 Wall. 227, 86 U.S. 227, 22 L. Ed. 80 and *United States v. Knight*, 14 Pet. 301, 39 U.S. 301 [Reprint 251], 10 L. Ed. 465, upon which appellant relies. But these decisions do not support the contention that a common carrier, carrying goods in interstate commerce, under contract with the Government, need not comply with the law with respect to the possession of the required certificate. The only case which seems to have passed upon the question is *United States v. Schupper Motor Lines*, D. C. 77 F. Supp. 737. It held squarely that a certificate of convenience and necessity was required by a common carrier carrying goods in interstate commerce for the Government. It is also worthy of note that Subsection (b) of Section 303, 49 U.S.C.A., which sets out specifically and in detail the vehicles exempted from the operation of the act, makes no reference to vehicles by common carriers while engaged in transporting goods for the Government." (Emphasis supplied)

Thus, *Dollar* lays down the principle that "transportation by the government" does not include service performed by a private operator under contract with the Government.

There is nothing in the legislative history of the Compact which alters the doctrine that a common carrier performing service for the government under contract must nevertheless be certified by the appropriate regulatory agency.

If the mere existence of a contract between a carrier and a signatory is sufficient to exempt the transportation service from regulation by the Commission, the result could cause irreparable damage to the objectives sought by the Compact. The exemption in question does not apply only to the Federal government, but to all signatories and their political subdivisions. Any county or town in the area would thus be free to set up a transportation system anywhere within the Washington Metropolitan area simply by engaging the services of a carrier under contract. The counties and cities

could embark upon their own transportation ventures including *regular route operations* serving the general public both outside and within their political boundaries. The large number of Federal agencies which ordinarily issue contracts involving transportation could do so with carriers who would not be required to submit themselves to the uniform regulations of the Commission. None of these operations would be subject to Commission jurisdiction. The Commission, therefore, would be faced with the prospect of attempting to regulate public transportation while competing, unregulated carriers are utilizing the same streets. The result would mean total defeat of the unified system of transportation envisioned by the enactment of the Compact. It was precisely to avoid this narrow, parochial approach and to regulate transportation on an area-wide basis that the Compact was created.

The experimental operation by the Secretary in the Fall of 1966, performed in his own vehicles and operated by his own personnel, is an example of transportation by the government, and meets the *Dollar* principle.

Here, however, the facts are further from *Dollar* than those in *U.S.A.C.*, for there the carrier was performing his services *for* the government. Here Universal is performing its service for the general public. Its voluntary acquiescence to the supervision of the Secretary—for a valuable concession privilege—does not alter the character of the service, which is that of a common carrier engaged in transporting the public for hire. The evidence clearly reveals that the service will be in Universal's vehicles, operated by Universal's employees, for a fare collected by Universal.

It should be noted that the contract between Universal and the Secretary states:

> "Whereas, the United States has not provided such necessary facilities and services and desires the Concessioner to establish and operate the same at rea-

> sonable rates under the supervision[6] and regulation[7] of the Secretary; . . ." (App. 68)

This demonstrates the unsoundness of the argument, by disclosing that even petitioner's evidence fails to support such a rationale, for it is apparent that Universal is to "establish and operate" the transportation.

The principal case relied upon by Universal is simply not in point, for in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), the contractor was performing his service for the government. The principle enunciated therein dealt solely with a question of agency law arising from a suit for damages to a third party. It has no application here.

The broad application urged to be given the exemption proviso is contrary to the well-accepted principle stated in *Piedmont & Northern Ry. v. Commission, supra*, 311:

> "As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

Universal and the Government urge this Court to reverse the applicability of these two cardinal legal principles, by giving a narrow construction to the purpose of the Compact and a broad brush interpretation of the exemption.

In fact, their theory of this case is predicated on strained interpretations of the language of the Compact—interpretations which would emasculate the meaning and purpose of the act. The intent of the legislative bodies of the Federal government and the States to create a law which would improve public transportation and alleviate traffic congestion on a coordinated basis would be frustrated by the artificial boundary raised by the Secretary of the Interior around park lands—land not restricted to the Mall area, but lands astride many of the major arterial streets in the Washington Metropolitan area.

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[6] The function of the Secretary.

[7] The function of the Commission.

The aims and ideals of so many far-seeing and dedicated public officials and private citizens embodied in the Compact warrant a better fate than that which would result from adoption of the theories espoused by the petitioner.

C. Universal Improperly and Erroneously Claims That Its Transportation Will Not Be Between any Points in the Metropolitan District

Universal contends that its service will not be operated "between any points" (Article XII, Sec. 1(a), but only from and to one point; therefore, its transportation is not within the ambit of the jurisdiction of the Commission. It then asserts that "this very significant fact" was overlooked by the Court of Appeals.

In the first place, counsel for the Commission is unable to find any reference to such a contention in Universal's brief to the Court of Appeals. Hence, it may not raise the point before this Court.

Moreover, the argument is absurd. The contract lists numerous points at which its service will touch in order that the history and other items of interest may be discussed. Further, it admits that the contract contemplates that it may provide a service whereby passengers may commence the tour, proceed to a "point of interest, *debark*, remain at that point of interest" and later continue his tour on another vehicle (Pet. Brief, p. 11). (Emphasis added) This is contrary to its argument on page 41 of its Brief.

Nor does the law say that "between any points" means two or more separate and distinct points. The movement between origin and destination constitutes transportation between points, whether the physical location of the points are at the same or different geographical locations.

III

THE APPLICABILITY OF THE D. C. TRANSIT FRANCHISE IS NOT BEFORE THIS COURT

The Court of Appeals did not discuss the contention of D. C. Transit, that its Congressional Franchise protects it from competition above and beyond the provisions of the Compact. Universal admits that the court of appeals did not pass upon this issue (Petitioner's Brief, p. 45).

The Commission, as it did below, neither endorses nor rejects D. C. Transit's position. Accordingly, it offers no argument on this point; moreover, it respectfully suggests that the Court should not entertain argument on this point.

CONCLUSION

The entire theme underlying the argument of the United States is the theoretical National-city cleavage between the Mall as a national shrine and the Mall as a part of the city of Washington. It presupposes that only a Cabinet officer can protect the former and that a state regulatory commission (in which category the Commission is erroneously placed) should not aspire beyond the latter.

Congress felt no such fear, nor did it adopt the cleavage concept. The converse is true. The evils Congress was trying to cure—i.e., the elimination of the fragmentation of the Washington metropolitan area occasioned by the various political divisions—could not be cured by excluding land owned by the United States.

The inescapable conclusion to be drawn from the peculiar relation between some of the Mall streets and the mass transportation complex in the Metropolitan area is that transportation on those streets is inextricably intertwined with transportation of the public generally and it is inconceivable that Congress would exclude them from the jurisdiction of the Commission.

The Compact is not a limitation upon the jurisdiction of the Secretary of the Interior—it merely imposes additional requirements upon a person about to engage in the transportation of persons for hire in the Washington Metropolitan District.

The court of appeals' opinion will preserve the dual relationship between the Compact and the laws defining the Secretary's power for their respective responsibilities are not antagonistic. In fact, accommodation and cooperation are their aim. Regulation by the Commission of a common carrier service performed in whole or in part over public streets owned by the Federal government and controlled by an agency thereof does not conflict with the internal control of the facilities by that agency since it retains its jurisdiction to maintain its control. This, in fact, has been the practice for years. Carriers desiring to operate over streets in the Parks area have sought operating authority from the Commission and permits from the Park Service.

There is nothing improper or illogical for two agencies of the government independently to exercise dominion over different facets of a particular program. Moreover, the public interest is best served by the defined dual roles of joint authorization in this area.

Congress has clearly voiced its intent that the transportation to be engaged in by Universal is subject to the provisions of the Compact. Neither Universal nor the United States has shown any substantial reason why the opinion of the court of appeals should be reversed.

Quite obviously, the issue is restricted to a local controversy, which has arisen out of the control of the Congress over the Nation's capital and its park areas therein. The problem has no relationship to the national park lands throughout the rest of this country, for nowhere else has Congress been confronted with this uniqueness and in no other legislation has Congress acted to establish the duality of jurisdiction which it obviously intended to establish in Washington, D. C.

The opinion and order of the court of appeals must be affirmed.

Respectfully submitted,

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